Supreme Court of the United States.

October Term, 1958

No. 38

RAILWAY EXPRESS AGENCY,
INCORPORATED,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
Appellee

Appeal from the Supreme Court of Appeals of Virginia

REPLY BRIEF FOR THE APPELLANT

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Appellant, in replying to the arguments advanced in the brief filed on behalf of Appellee, will discuss such of them as seem material under the same headings and, as far as practical, in the same order in which they are dealt with by counsel for Appellee. Unless otherwise stated all italics are supplied.

I.

Statement of the Case

Appellee contends that the statement of the case included in Appellant's statement "requires amplification" in some respects.

Appellee contends in this connection that the facts recited on pages 3-4 and 37-39 of its brief raise the question whether, notwithstanding its stipulation that Appellant "conducts only an interstate business in Virginia" (R. p. 87), it should be taxed as though doing an intrastate business in this State. The facts referred to relate primarily to the relationship between Appellant and the Virginia Company and their joint use of equipment and personnel.

Appellee contends that Appellant, under the terms of its joint operating agreement with the Virginia Company, has assigned to the latter "its intrastate privileges in Virginia" and that the latter company is thereby "obligated to perform the obligations of Appellant imposed by contracts between Appellant and such carriers concerning intrastate operations in Virginia (Brief pp. 3, 4). This is true because, and only because, of the policy of Virginia toward foreign public service corporations, as defined in Section 163 of its Constitution. As this Court observed in its opinion on the former appeal:

> "As a consequence of the State's own policy, *this appellant does no business in Virginia which the State has power to prohibit* but does only such as it can conduct under protection of the Commerce Clause of the Federal Constitution. To handle such intrastate express as falls within the power of the State to control, a separate Virginia subsidiary *necessarily* was organized." (347 U. S. 359, 361)

The method thus employed as a practical means of securing intrastate express service for the people of Virginia was, in fact, *suggested by the Virginia Court* in its opinion affirming the decision of the Commission denying Appellant authority to do an intrastate business in this State. The Virginia Court said:

> "No insurmountable obstacle stands in the way of plaintiff in error, if *it* desires to do intrastate business in this State. *It may organize a corporation under the laws of the Commonwealth to do intrastate business,* and if it desires to do so then merge with such domestic corporation under the provisions of sections 3821-3827 of the Code of Virginia 1924." (153 Va. 498, 513)

This Court lent its approval to the foregoing suggestion of the Virginia Court when, in affirming that decision, it said:

> "We may add that *as suggested by the State Court* the difficulties created by the Constitution of Virginia probably will not prove hard to overcome when it is found that they must be met." (282 U. S. 440, 444)

It follows, therefore, that what has been done by Appellant through its ownership of the Virginia Company is the result of corporate activity and procedure having the sanction of the Virginia Court as well as this Court as a means of permitting Appellant to conduct its interstate business in Virginia and provide, through the Virginia Company, facilities for the conduct of an *intrastate* express business in this State *without itself engaging in the latter activity.*

The stipulation that Appellant "conducts only an interstate business in Virginia" (R. p. 87) was entered into by counsel for Appellant, for the Commonwealth and for the State Corporation Commission, *prior* to the hearing before the Commission and was introduced and considered by it as a part of the evidence in the case (R. p. 15). *All the facts now referred to by Appellee* were, therefore, *before* the Commission *which considered them in the light of the stipulation.*

In the light of them the Commission unanimously decided that:

> "The peculiar feature of this case is that the Railway Express Agency *does no intrastate business in Virginia*". (R. p. 50) (Italics by the Commission)

Moreover, the Commission, in its opinion from which the *former* appeal was perfected, heard and decided by the Virginia Court in 1953 (194 Va. 757), reached the same conclusion. It said:

> *"The Delaware corporation created and uses the Virginia corporation not for the purpose of getting around the law but for the purpose of obeying the law.* We therefore hold that the corporate entity cannot properly be ignored and that the Delaware corporation is *engaged only in interstate business in the State of Virginia . . ."* (SCC Reports, 1952, p. 34)

In view of the foregoing holding, counsel for Appellant, an Assistant Attorney General for the Commonwealth and counsel for the Commission made a part of the records (Nos. 436 and 437) before the Virginia Court on the appeal from the Commission's decision in that proceeding a stipulation reading as follows:

> "4. *Since the Commonwealth admits and the Commission has found that the taxpayer does no intrastate business in Virginia, the testimony and exhibits relating to that issue are not material on this appeal".*

The "testimony and exhibits" relating to the manner in which both Appellant and the Virginia Company did business in Virginia had been fully developed in the hearings before the Commission *in that proceeding* and embraced all

of the facts, among many others, presently referred to by Appellee on this appeal.

In the light of the record *then* before it and the stipulation above referred to, the Virginia Court had this to say on the prior appeal as to the nature of Appellant's business:

> "Railway Express Agency, Incorporated, a Delaware corporation, is engaged in the handling and transportation of goods, wares and merchandise in express service in both interstate and intrastate commerce in the District of Columbia and in all the States of the Union except Virginia, *where it does solely an interstate business. Its intrastate express business in this State is carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, a Virginia corporation, organized on October 20, 1931*, following the affirmance by this Court of an order of the State Corporation Commission which *denied the appellant the authority to do an intrastate express business in this State*". (194 Va. 757, 759)

When the case was before this Honorable Court on the prior appeal (October term, 1953), (record No. 163), the last mentioned stipulation again appeared in the record (page 20).

While it is true, therefore, that *some* of the facts referred to on pages 3-4 and 37-39 of Appellee's brief "were not considered by this Court in the prior case" (Br. p. 38), they were not brought before it *because* Appellee admitted both before the Commission and the Virginia Court that *notwithstanding them* Appellant "does no intrastate business in Virginia" (R. p. 87).

The manner in which Appellant's business is conducted in Virginia has theretofore been before the Commission and the Virginia Court since 1929 (153 Va. 498), and it

has *never heretofore been contended* that while engaged solely in interstate commerce, Appellant should be taxed "as though" it was engaged in intrastate commerce in Virginia because it has contracted with certain railroads in such manner as to obligate itself to render express service in Virginia (both in interstate and intrastate) in respect to which it has organized its wholly owned subsidiary, the Virginia Company, to perform, and has assigned to it the right and obligation to perform, Appellant's undertakings in respect to *intrastate* express shipments and has made a contract with the Virginia Company whereby property and personnel are jointly employed to render both interstate and intrastate services.*

The *method* of operation employed by the Delaware and Virginia Companies has no bearing on the *nature* of the business transacted by either company. The Delaware Company uses the joint facilities for the transaction of its interstate business and the Virginia Company uses such facilities for the transaction of its intrastate business. *The nature of the business conducted by each is in no way affected by the facilities or personnel employed for that purpose.*

Moreover, the uncontradicted testimony of the witness C. J. Jump, Vice President, Administration and Finance, of Appellant, shows that it would be inefficient and uneconomical to operate the two companies in Virginia except under

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*The agreement between the Delaware and Virginia Companies was first entered into on March 7, 1932, and was amended January 22, 1942 (R. p. 100 *et seq.*) Copies of these contracts have been exhibited *each* year with the Appellant's annual report to the Commission. Their relation to the joint operations of the Delaware Company and the Virginia Company has, therefore, been known to the Commission since the Delaware Company was denied authority to transact an intrastate business in Virginia and the Virginia Company was organized by it, as a wholly owned subsidiary, for the purpose of conducting such business.

a joint agreement such as that complained of by Appellee. Mr. Jump testified:

> "Q. So whether the title of this property we are speaking of is in the Virginia Company or the Delaware Company depends on the decision of the Delaware Corporation, it could be either one or the other Company, or intermingled?
>
> "A. I don't know whether that is a question I could answer or not. There may be some legal connotation which I don't know about, but, so far as operational operations are concerned, it would be my thought that the Express Company, operating under the reasonable way they operate — we were forced by law to set up the Virginia Company to do the intrastate business, *and in my opinion the intrastate business in the State of Virginia would not support a company that was operating with personnel and equipment and facilities entirely separate and by itself.* If the Virginia Company were owned by the citizens of the State of Virginia, I think they would probably want to make an arrangement with the Railway Express Agency, which carries on the interstate business, for the use of joint employees, joint equipment, joint forms, and so forth. Our receipt forms carry the name of the Delaware Company. Opposite the name of the Delaware Company, it says, 'For interstate shipments,' and also now under that is the name of the Virginia Company, and opposite the name of the Virginia Company it says, 'For intrastate shipments.' The two companies have undertaken to operate in an efficient, economical operation, *but, in fact, the business is carried on by separate companies.*" (R. p. 24)

Appellee's contention in this respect implies that Appellant is doing indirectly what Section 163 of the Constitution says and what the Virginia Court held in *Railway Express*

Agency, Incorporated v. *Commonwealth* (1929), 153 Va. 498 [a holding which was affirmed by this Court in 1931 (282 U. S. 440)], it may not do directly, namely, conducting the business of a public service corporation in intrastate commerce in this State. The Commission's opinion in the former case (SCC Reports 1952, p. 34) heretofore quoted from in this discussion *expressly decided* that the Virginia Company was "created and *used*" by Appellant for the purpose of obeying, not violating the law. The Virginia Court affirmed that decision (194 Va. 757).

It is therefore respectfully submitted: (a) that Appellee, having "admitted" in the *former* proceeding and having "stipulated" in the *present* proceeding that Appellant does "only an interstate business" in Virginia; (b) that the Commission having *twice* found, *without objection from the Commonwealth*, that Appellant does "only an interstate business" in Virginia, the first of which findings was affirmed by the Virginia Court on the former appeal; and (c) that, *since no cross-error was assigned to the Commission's failure to decide otherwise in the instant case*, Appellee should not now be heard to contend that, notwithstanding the interstate nature of its business, Appellant should, because of its ownership and control of the Virginia Company and their joint use of property and personnel, be taxed "as though" it did an intrastate business in Virginia.

II.

Gross Receipts Do Not Measure Going Concern Value

It has been the contention of Appellee throughout this litigation that the tax in question was a *property tax* on the "*going concern value*" of express companies (Brief p: 8),

Having in mind the particular type of property which Appellee asserts is reached by this tax, Appellant asserted in its Opening Brief as it has consistently maintained in the courts below that the tax was *not* a *property tax* but *a tax on the extent to which Appellant had conducted its interstate express business in Virginia* and therefore invalid under *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951) and the decision in this case on the prior appeal—347 U. S. 359 (1954) (Brief pp. 14-20).

Appellee contends that gross receipts are a measure of going concern value and that therefore the tax may properly be called a property tax. This contention wholly ignores the economic fact of life, recognized by this Court as early as *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 697 (1894), that while the *value* of business property results from the *use to which it is put*, this value *"varies with the profitableness of that use."* Gross receipts measure the *volume* not the *profitableness* of such use.

In support of its contention, Appellee cites and quotes from cases approving the use of gross receipts to measure a *privilege* or *excise* tax. No cases cited however, except *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450 (1918), and *United States Express Company* v. *Minnesota*, 223 U. S. 335 (1911), involved a tax that was said to be a *property* tax. In those two cases, which were decided prior to *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918), the taxpayers *were engaged in both intrastate and interstate commerce* in Minnesota. Therefore, the *apportioned* gross receipts taxes sustained as *property* taxes in these cases could properly have been upheld as taxes on the privilege of doing an intrastate business in Minnesota measured by the apportioned gross receipts from both interstate and intrastate commerce in that state. Thus, while the deci-

sions in *Cudahy* and *United States Express Company* reached the correct result, they are inconsistent with the subsequent decisions of this Court to the extent that they approved the use of gross receipts as a measure of the value of the property of an wholly interstate transportation company *including its going concern value.*

As pointed out in Appellant's Opening Brief (p. 17) this Court in *United States Glue Co.* v. *Oak Creek, supra,* upheld a net income tax on the ground that it burdened interstate commerce only indirectly, but recognized the obvious fact that gross receipts are a measure of the *volume* of business done by a taxpayer but not the *value* produced by such business as does net income. As Appellee indicates in its brief, this principle was also recognized in *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 295 (1917) and *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307 (1938) (Brief pp. 17-18). It was also inferentially recognized in *Southern Railway Co.* v. *Kentucky,* 274 U. S. 76 (1927), cited in Appellant's Opening Brief (p. 16), where the Court in discussing valuation of railroad properties for purposes of taxation said:

> "If taken separately it is clear that because of *lack of net earnings, no substantial intangible elements of value could reasonably be attributed to the railroad* of that Company." (p. 83)

Appellee advances the novel idea that since this Court found on the prior appeal that the Virginia gross receipts tax on express companies was a privilege tax, that decision is no authority for the point that gross receipts do not measure going concern value (Brief pp. 18-19). Appellee ignores the fact that one of the Court's principal reasons for holding

that the former tax was a privilege tax was that, since it was measured by gross receipts it could not be sustained as a property tax. The Court said:

> "The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. But we have declined to regard mere gross receipts as a sound measure of going concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume." (347 U. S. 359, 367)

Appellee overstates Appellant's contention when it says that Appellant asserts that *any* tax measured by gross receipts, whether or not apportioned, is a privilege tax (Brief p. 19). The correct statement of Appellant's contention is that when, as in this case, the going concern value of a transportation business is sought to be taxed as a *property* tax, fairly apportioned gross receipts may not be used as the measure of such intangible worth. The use of gross receipts as a measure of the tax in such a situation *establishes* the tax as a privilege or franchise tax on the volume of business done and not as a tax on the property employed in that business.

In *Western Livestock* v. *Bureau of Internal Revenue,* 303 U. S. 250 (1938), relied upon by Appellee, the New Mexico gross receipts tax on a publishing company which had its only office and place of business in New Mexico was held to be a tax on the *privilege of conducting such business in New Mexico* measured by gross receipts from intrastate and interstate business done by the taxpayer. Mr. Justice Stone's comments concerning the use of gross receipts to measure going concern value of a business referred to by

Appellee (p. 21) were not necessary to the decision, are clearly inconsistent with later opinions of this court and (although not so expressly stated in the opinion) were apparently based upon *Cudahy* and *United States Express Co., supra,* which, as was pointed out above, have been subsequently ignored by the Court.

The case of *Maine* v. *Grand Trunk R. Co.,* referred to by Appellee (p. 20), falls in the same category as *Western Livestock.* Both intrastate and interstate business were involved and the tax was levied for the privilege of doing business in Maine. A careful reading of the opinion makes it clear that Mr. Justice Holmes was mistaken in suggesting in *Galveston H & S.A.R. Co.* v. *Texas,* 210 U. S. 217, that the gross receipts tax was sustained on the ground that it was levied in lieu of *ad valorem* taxes (Brief p. 20). According to the Court's opinion it was sustained as a proper measure of an excise tax—"the value of the privilege conferred". As was later said in this connection by Mr. Justice Holmes in *Oklahoma* v. *Wells, Fargo & Co.,* 223 U. S. 298:

> "It would be difficult to apply to a tax levied in these days the explanation of *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217, given in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, 226. . . . and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items." (p. 301)

In summary, aside from *Cudahy* and *United Express* and Mr. Justice Stone's *dictum* in *Western Livestock,* Appellee has no authority for its contention that gross receipts may be used to measure going concern value. The contrary position, on which Appellant relies, is manifestly sound economically and has been consistently accepted by this Court. The use of such receipts *establishes* the tax as a *privilege* tax and not a *property* tax.

Appellee contends that the franchise tax presently imposed by Section 58-547 is part of a system or scheme of taxation designed by the Constitution of Virginia and the statutes enacted in pursuance thereof whereby the goodwill or going-concern value of a transportation corporation may be separately taxed as a part of the state's general scheme of *property* taxation. While Appellant denies the correctness of this assertion *when applied to foreign public service corporations engaged solely in interstate commerce* (which they are prohibited from doing by Section 163 of the Constitution), it is respectfully submitted, for the reasons hereinbefore stated, that the use of *gross receipts* as a *measure* of the *value of the going-concern worth* of such a corporation whether a part of a system of taxation or when standing alone, renders the tax invalid. Gross receipts do not determine the going-concern *value* of such a business but merely the extent of the use of its property in such business, whether profitable or unprofitable.

III.

The Amount of the Tax

Appellee points out that Appellant's assertions against the "amount" of the tax are made "in spite of the fact that Appellant failed or refused to report in Virginia the amount of its receipts earned from business passing through, into or out of the State" (Brief p. 32).

It is true that Appellant answered the request for this information on the forms supplied by the Commission with the word "none" (R. p. 110). It is perfectly obvious, however, that this was a clerical inadvertence and that the answer given was intended to apply to the preceding question calling for the "amount" of "all receipts from business be-

ginning and ending *within* this state" (R. p. 110). Appellant conducted no intrastate business in Virginia and therefore had no such receipts. Its answer is wholly consistent with the facts elicited by this question.

It is equally apparent from the protest which the Commission's witness Dickerson stated was attached to its report that Appellant was unable, not unwilling, to state its gross receipts derived from its interstate business in Virginia *since it had no way of determining them.* This witness testified:

> "Q. And there is attached to that a rider which states, 'This company does solely an interstate express business in Virginia and has no way of determining what part of the receipts derived by it from such business was earned "in business passing through, into, or out of this State."' That statement appears on the protest made a part of the return, does it not?
>
> "A. Yes." (R. p. 38)

As a result of the foregoing Appellee points out that the Commission invoked the provisions of Section 58-549 and proceeded to determine the tax based on the "best and most reliable information" available (Brief p. 32). Appellee not only concedes but urges in argument that Section 58-547 imposing the franchise tax *makes no attempt to apportion gross receipts derived solely from intrastate commerce.* Neither did the form promulgated by the Commission prescribe or suggest any method by which Appellant's gross receipts derived from transportation of express matter "through, into and out of this State" should be determined.

Nothing was shown in the proceeding and nothing can be shown to question the truthfulness of the statement in the protest attached to Appellant's return, that it had no way of

determining what part of its receipts were derived from business "passing through, into or out of this State." *It could not affirmatively prove a fact of which it had no knowledge.* There was, therefore, no such "failure" on the part of Appellant to make the report required by the Commission as is contemplated by Section 58-549. Appellant's failure was due to its *inability* to provide the information requested and not to any purposeful *refusal,* which is obviously the kind of refusal intended to be dealt with by the Virginia statute and the kind of refusal which might otherwise estop Appellant from attacking the "amount" of the tax under well settled principles of the law of taxation.

Assuming, however, that Appellant's failure, not its refusal, to report the information requested justified the Commission in making an apportionment, it is submitted that the formula employed shows on its face that the Commission allocated to Virginia a percentage of Appellant's gross receipts not properly or fairly attributable to Virginia in a constitutional sense.

The Commission's formula is set out in full as a part of Exhibit 10 (R. p. 108-109). A detailed explanation of the manner in which it was prepared and applied, when read in the light of the testimony of the Commission's witness Dickerson (R. p. 32 *et seq.*), appears as Appendix A of this Reply Brief.

The manifest fallacy in the Commission's computation results from the fact that it erroneously sought to determine the amount of Appellant's *gross* income from the interstate commerce which it conducted over the six railroads and five airlines *in Virginia* by applying to the amount which it had determined Appellant had actually paid them for express privileges on a mileage basis, the *ratio* which Appellant's *total system gross receipts bore to the total amount it had*

paid all railroad companies for express privileges, namely, 2.824. There was no evidence whatever to support the assumption upon which the Commission's formula was based that the *ratio* of Appellant's Virginia total gross receipts from express matter carried on only six railroads and five airlines to the amount actually paid such Virginia railroads was the same as the ratio which Appellant's gross receipts from *all* its business bore to the amount paid to *all* railroads over which it transported express matter. *Unless these ratios were the same this essential factor in the Commission's formula is unsupported by proof or even by reasonable assumption.* There was no such evidence, and it is respectfully submitted that none such exists. The amounts shown in Column D of the Formula (Appendix "A") aggregating the total of $6,499,519, which the Commission found to be the amount of gross receipts that Appellant derived *from its interstate business in Virginia*, are therefore clearly erroneous, are unsupported by any reasonably accurate computation *and constitute no valid basis for the assessment.*

Appellee also contends that under the prior statute interstate gross receipts "were presumptively determined by a formula based on proportion between mileage in Virginia and total system mileage", while, under Section 58-547 as amended, such receipts are described as those "derived from operations within this State", and that it was only because of Appellant's failure to report gross earnings from its operations within this State that the Commission exercised the authority conferred upon it by Section 58-549 by determining such receipts from "the best and most reliable information that it can procure". Whether the present statute authorizes such an apportionment on a mileage basis or not seems immaterial since the formula employed by the Commission in determining Appellant's gross receipts in Vir-

ginia was admittedly prepared on a mileage apportionment basis and would seem consistent with the intent of Section 58-547 as presently enacted since that section provides that, if a corporation's operations "are partly within and partly without this State", then its gross receipts from operations within the State shall be determined "from the transportation within this State of express transported through, into and out of this State." Obviously the Commission could have made no such determination without, as it in fact did, applying what it considered to be an appropriate mileage formula. As previously pointed out, the formula actually employed by the Commission did not adhere to the proportionate mileage basis properly and commonly employed in such cases.

Appellee asserts in this connection that Appellant's contentions (1) that it had no property in Virginia on which a tax could be levied in an amount sufficient to support this "in lieu" tax and (2) that the going concern value attributed to its property is so disproportionate as to "overtax our credulity" are "based upon the assumption of a *false* tax rate of one-half of one percent (50¢ on $100 of value)" since no such tax is imposed upon Appellant's intangible property or money under the present statute (Brief p. 35). It is of course true that no property tax is presently imposed upon Appellant's intangible personal property or money since it would have been a contradiction in terms to say that the franchise tax imposed by Section 58-547 was *in lieu* of a tax on *such* property and at the same time prescribe a rate at which such property was subject to taxation.

The "mathematical" formula employed by Appellant to demonstrate that the tax in question is not in fact a property tax but, if considered as such, is so disproportionate to the value of Appellant's property in Virginia as to be unconstitutional is made necessary by the Commission's failure to

ascertain or determine *what* the value of such property was. Without some knowledge of the value of Appellant's intangible personal property and money, there is no way of determining whether a franchise tax in the "amount" imposed by the Commission was lawfully imposed *in lieu* of a tax upon such property. It could not, under the decision of this Court, be in excess of what would be legitimate as an ordinary tax on the property *in lieu* of which it is imposed (see authorities relied upon in Appellant's Brief p. 25).

The rate of 50¢ on the $100 of value was imposed on Appellant's intangible property and money prior to the 1956 amendment to Article 4 of Chapter 12 of the Code of Virginia (see Section 58-546). Similar taxes were and still are imposed on railroads and other public service corporations (see Sections 58-516, 58-517, etc.). In this situation Appellant sought to demonstrate, and we respectfully submit successfully demonstrated by the "mathematical" computation of which Appellee complains, that in order for its intangible personal property (including good will or going concern value) in Virginia to justify a tax of $139,739.66 as imposed by the Commission, its property of this kind would have to have a value (if taxed at the old rate of 50¢ on the $100 of value) of $27,947,932. Appellant contends that its tangible property in Virginia having a total value of $475,665, as well as its intangible personal property including the value of its contracts with the railroads over which it transports express matter, can obviously have no such good will or going concern value, although if taxed at the rate previously applied by the statute to *such* property, *and in lieu of which the present franchise tax is imposed,* the Commission would have had to find that Appellant's property of this nature had a valuation of $27,947,932.

Appellee refers in this connection to the decision of the Virginia Court in which it is stated that:

> "There is no evidence in the record as to the relation between the Company's property and its revenues in other states. Code Sections 58-672 and 58-1122 provide ample means for correcting excessive assessments." (Brief p. 34)

This statement is wholly inconsistent with the record. Appellant did just what the Virginia Court pointed out it should have done, namely, petition the Commission for a correction of its assessment and a refund of the tax, as provided in Section 58-672 of the Code. The very first paragraph of its petition recites that it "respectfully presents this petition pursuant to the provisions of Section 58-547 of the Code of Virginia (1950)" and then alleges the facts upon which it based its application for relief (R. p. 1 *et seq.*). The prayer of the petition was for the correction of the assessment and a refund of the tax (R. p. 5). At the hearing oral testimony was introduced and voluminous exhibits filed showing the "relation between the Company's property and its revenues in other states", as suggested by the Virginia Court, all of which were relied upon before the Commission in support of Appellant's contention that the tax was a burden on interstate commerce and, if considered to be a property tax, was unconstitutional in that it deprived Appellant of its property without due process of law (R. pp. 4-5). It is difficult to understand, therefore, how Appellant could have done more in an effort to seek correction of the tax than it did do in conformity with the Virginia statutes to which the Court refers.

Throughout Appellee's brief it is repeatedly asserted that Appellant's ownership of the Virginia Company is of great value to it since it is enabled through that company to transact an intrastate business in Virginia and receive all of the

revenue which the Virginia Company receives directly from the transaction of such intrastate business. The implication of these assertions does not conform to the terms of the agreement between the two companies which provides in this respect that:

> "The revenues on intrastate business in Virginia shall accrue to the Virginia Company as shall also any other revenues which shall be earned by it or which it shall be mutually agreed shall be included in its revenue accounts. The Virginia Company shall assume all operating expenses *and taxes* incident to earning its revenues. *Any excess* of revenues over expenses, *taxes*, and other costs, of or chargeable to the Virginia Company as provided herein, shall be credited to the Delaware Company, in consideration of which the Delaware Company shall protect and save harmless the Virginia Company from any further payments for the transportation of the express matter of the Virginia Company over the railroad and other transportation lines in Virginia and for the use by the Virginia Company of the real property and equipment of the Delaware Company as herein provided for." (R. p. 102)

From the foregoing it is manifest that Appellant derives no financial advantage from its ownership of the Virginia Company which can be said to augment or increase the value of its *interstate* business since, under its "Standard Express Operations Agreement" with the railroads (Ex. No. 1 with the original Record), it is required to pay them for their services in transporting its express matter *all* of its income after operating expenses and other deductions allowable under the Internal Revenue laws (R. p. 6), thus leaving it no opportunity to retain, or profit by, *any* revenue which it may have received from the Virginia Company un-

der the foregoing provisions of the agreement between them.

The great value which the Commission and the Virginia Court attributed to these "express privilege" contracts is, therefore, shown to be non-existent since Appellant is prevented from profiting (in the sense that it derives net income) by its operation under them. It is the railroads of Virginia which derive *all* of the revenue of Appellant over and above its operating costs, etc., and the revenue thus received by them is taxable as a part of their gross receipts under the provisions of Section 58-519 of the Code.

Moreover, the Virginia Company was assessed with and paid all property taxes imposed upon it by the State, as well as a franchise tax pursuant to Section 58-547 based on gross receipts derived from its intrastate business (R. pp. 16, 92). If therefore, as contended by Appellee, Appellant should be taxed "as though" it did an intrastate business in Virginia, it is manifest that the State has received *all* of the property taxes *as well as a franchise tax* upon the gross receipts which Appellant may incorrectly be urged to have derived from the transaction of such intrastate business in this State through its ownership of the Virginia Company.

CONCLUSION

For the reasons heretofore stated and those more fully presented and discussed in Appellant's opening brief, it is respectfully submitted that the judgment and order of the Virginia State Corporation Commission assessing Appellant with the franchise tax in the amount of $139,739.66 for 1956 and the decision of the Supreme Court of Appeals of Virginia affirming such assessment should be reversed, the

assessment corrected and expunged from the assessment rolls, and the amount of the tax refunded to Appellant.

October 10, 1958

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APPENDIX A

Explanation of formula employed by the Commission in determining gross receipts derived by Appellant from the transportation of express through, into and out of the State of Virginia pursuant to Section 58-547 of the Code.

The Commission:

(a) Ascertained from Appellant's report to it the amounts paid by Appellant to such six railroads and five airlines for express privileges (Column A of Statement);

(b) Having ascertained the "percentage of mileage in Virginia" of these railroads and airlines to their system mileage (Column B of the Statement) the Commission multiplied the amounts shown in Column A by the Virginia mileage of such lines and *thus* ascertained what *it* considered to be the amounts paid by appellant to such railroads and airlines for the transportation of express matter in Virginia in interstate commerce (Column C of Statement).

(c) Since the amounts shown in Column A represented amounts paid such carriers under the "Standard Express Operations Agreement" (Exhibit No. 1, Appendix p. 1) *after all of Appellant's operating expenses, depreciation charges, etc., had been paid,* it was necessary for the Commission in some manner to determine what Appellant's *gross* income had been from the express business conducted on such six railroads and five airlines in Virginia.* This it undertook to do by ascertaining the *ratio* of Appellant's total gross receipts to the total amount paid to all railroads

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*Appellant's operating expenses include no part of the operating cost of the several railroads over the lines of which express matter is transported, pursuant to the terms of the "Standard Express Operations Agreement". The amount paid the railroads by Appellant is in compensation for this service and is what is referred to in Appellee's brief as "express privileges".

over which it operated in the United States ($344,391,154 and $121,951,105, respectively) which it determined to be 2.824 (Record p. 108).

(d) The Commission then multiplied the amount which it had determined to be the income received by each of the six railroads and five airlines from Appellant on account of express matter transported in interstate commerce *in Virginia* by 2.824, and thus determined what it considered to be the *gross* income which Appellant derived from the interstate commerce which it transacted over the lines of such six railroads and five airlines in Virginia, namely, $6,499,519 (Appendix p. 25).